

No. 89-683

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

ROBERT B. WATERHOUSE,

*Petitioner,*

—against—

RAMON J. RODRIGUEZ, Chairman of the  
New York State Board of Parole, et al.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

**REPLY BRIEF FOR PETITIONER**

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November 28, 1989

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I. SIXTH AMENDMENT

The very cases cited by Respondents demonstrate the conflict between the decision below and prior decisions of this Court. For example, Respondents claim that "this Court has demonstrated a reluctance to impose a per se standard or presumption

of ineffective assistance of counsel on licensed attorneys, favoring instead the Strickland test." (Opp. at 8.)<sup>1</sup> However, Strickland itself recognizes that:

In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.

Strickland v. Washington, 466 U.S. 668, 692 (1984). Moreover, the only other case cited by Respondents as exhibiting this Court's "reluctance" to employ a per se rule -- United States v. Cronic, 466 U.S. 648 (1984) -- emphatically states that the "presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial,"

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1 Citations to "Opp. at \_\_\_\_" are references to the Brief In Opposition For The Respondents," dated November 14, 1989.

and that this "Court has uniformly found constitutional error without any showing of prejudice" in such instances. Id. at 659 & n.25 (citations omitted).

While this Court has not specifically addressed the effect of representation by unlicensed or disbarred counsel, Courts of Appeals, Highest State Courts, and lower courts have addressed the issue.

Respondents' contention that the Second Circuit's decision here is consistent with decisions "rendered by sister circuit courts" (Opp. at 5) is inaccurate and misleading for several reasons. First, Respondents disregard the conflicting decisions of several Highest State Courts where the per se rule was applied. See People v. Williams, 93 Ill. 2d 309, 444 N.E.2d 136 (1982); People v. Felder, 47 N.Y.2d 287, 391 N.E.2d 1274 (1979); Seattle v. Ratliff, 100 Wash. 2d 212, 667 P.2d 630

(1980). Further, Respondents' assertion is premised on the mistaken notion that the Second Circuit is the only Court of Appeals that has utilized the per se rule, and then only "sparingly." (Opp. at 7.) While this statement concedes the conflict between the decision below and the decisions in Solina v. United States, 709 F.2d 160 (2d Cir. 1983) and United States v. Cancilla, 725 F.2d 867 (2d Cir. 1984), it also overlooks the conflicting decision of the District of Columbia Circuit in Harrison v. United States, 387 F.2d 203 (D.C. Cir. 1967), rev'd on other grounds, 392 U.S. 219 (1968). Moreover, in the one Court of Appeals case cited by Respondents as being consistent with the decision below, a vigorous dissent was filed regarding that court's decision not to employ the per se rule. United States v.

Mouzin, 785 F.2d 682, 700 (9th Cir. 1986) (Ferguson, J., dissenting).

Respondents' argument that a per se rule is appropriate where representation is by never-licensed counsel but inappropriate where representation is by disbarred counsel trivializes the importance of counsel in our system of justice. There is no principled basis to distinguish between representation by a licensed lawyer who is disbarred for incompetence and dishonesty and one who never passes the bar. Both are prohibited from practicing law because they do not meet the minimum qualifications for representing a client.<sup>2</sup> As Judge Ferguson

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2     Waterhouse does not argue that a per se rule should apply where an attorney is disbarred or suspended purely for technical reasons, such as non-payment of dues. See Johnson v. State, 225 Kan. 458, 590 P.2d 1082 (1979). Unlike here, the discipline imposed in such cases does not call into question the attorney's basic competence and integrity.

cogently explained in United States v.

Mouzin:

The distinction between a never-admitted attorney and a disbarred one makes little sense. The discipline imposed against the attorney in this case was for failing to protect his client's [interests]. Although [defense counsel] proved that he was sufficiently competent to pass a bar exam, he was utterly incapable of representing his clients.

785 F.2d at 702 n.4 (Ferguson, J., dissenting). Judge Ferguson's analysis applies with special force here, where LaFreniere was disbarred for at least ten separate acts of incompetence and dishonesty. Nor is Judge Ferguson alone in reaching this conclusion. State courts, too, have concluded that the per se rule should apply to disbarred counsel. See People v. Williams, 93 Ill. 2d 309, 444 N.E.2d 136 (1982) (per se rule applied where disbarred attorney); People v. Williams, 140 Misc. 2d 136, 530 N.Y.S.2d

472 (Sup. Ct. Queens County 1988) (same).<sup>3</sup>

Finally, Respondents repeatedly assert that, although disbarred "effective November 15, 1966" -- the second day of Waterhouse's Huntley hearing -- LaFreniere never represented Waterhouse after he learned of his disbarment. Even if it were true that LaFreniere had no knowledge of his disbarment -- and there is no record support for such speculation<sup>4</sup> -- that

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3 Application of a per se rule will not affect the conviction of a defendant represented by fully licensed counsel who is disbarred subsequent to the conviction. The Sixth Amendment guarantees representation by properly licensed counsel; it is not a guarantee that in the future such attorney will never suffer a lapse in professional judgment. Thus, where disbarment of an attorney does not have retroactive effect, there is no reason to apply retroactively a per se rule, as long as the accused was represented by counsel licensed at the time of the proceedings.

4 As detailed in the Petition (pages 38-40), there is no support in the record for the claim that LaFreniere was  
(continued...)

should make no difference to the imposition of the per se rule. The Sixth Amendment is not designed to regulate the good faith of an attorney but

"is one of the safeguards determined necessary to insure fundamental human rights of life and liberty," and a federal court cannot constitutionally deprive an accused, whose life or liberty is at stake, of the assistance of counsel.

Glasser v. United States, 315 U.S. 60, 70 (1942) (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)). Thus, whether or not LaFreniere was aware of it, Waterhouse was represented at the crucial Huntley hearing by one who, for substantive reasons of

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4(...continued)  
unaware of his disbarment when he represented Waterhouse, which is decisive under the Second Circuit's analysis. Thus, Waterhouse also seeks certiorari for "an initial disposition [of this dispositive fact] in the District Court after an evidentiary hearing." See DeMarco v. United States, 415 U.S. 449, 450 (1973) (per curiam).

incompetence and dishonesty, was found to be unfit to practice law. Considering that the "right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial," Glasser, 304 U.S. at 76, representation by counsel disbarred for incompetence and dishonesty must, in and of itself, be per se prejudicial.

## II. HEARING ON COERCED CONFESSION

Respondents utterly fail to confront the application of Townsend v. Sain, 372 U.S. 293 (1963) to the facts of this case, preferring instead to rely on an assumption that the state court judge "obviously" disbelieved Waterhouse's Huntley testimony that he was interrogated for two hours while forced to sit naked on a metal chair. (Opp. at 11.) However, as detailed in the

Petition (pages 41-46), such an assumption is insufficient where, as here, there has been no express finding on a decisive fact; in such instances, Townsend v. Sain requires a federal evidentiary hearing.

CONCLUSION

For the foregoing reasons, and for the reasons in the Petition, we respectfully request that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit.

Dated: November 28, 1989

Respectfully submitted,

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